APPENDIX A

OPINION OF THE COURT OF APPEALS

CHARLOTTE E. NEUBAUER, et al.,

Plaintiffs-Appellees,
Cross-Appellants,

v.

OWENS-CORNING FIBERGLAS CORP., et al.,

Defendants-Appellants,
Cross-Appellees,

v.

PITTSBURGH CORNING CORP., et al.,

Third Party Defendants-
Appellants, Cross-
Appellees.

Nos. 81-8021 to 81-8033 and 81-1939
to 81-1951.

United States Court of Appeals,
Seventh Circuit.

Argued February 24, 1982
Decided August 13, 1982
As Amended August 18, 1982
Rehearing Denied September 16, 1982

Appeal from the United States District Court
for the Eastern District of Wisconsin.

Before CUMMINGS, Chief Judge, STEWART, Justice (Retired),* and ESCHBACH, Circuit Judge.

CUMMINGS, Chief Judge.

These appeals require us to determine when the Wisconsin statute of limitations for personal injuries begins running against causes of action for asbestos-caused diseases.

The plaintiffs or decedents in each of the ten cases below were insulation workers who were exposed to insulation containing asbestos. In two of the cases the insulation workers died from mesothelioma, a cancer that allegedly is caused by exposure to asbestos fibers. In the remaining eight cases the workers suffer from asbestosis, a lung disease involving fibrosis of the lungs, pleural thickening, pleural plaques, and shortness of breath. For a detailed description of asbestosis, see Porter v. American

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* The Honorable Potter Stewart, Associate Justice (Retired) of the Supreme Court of the United States, is sitting by designation.

Optical Corp., 641 F.2d 1128, 1132-1133 (5th Cir. 1981). The defendants and third-party defendants are or once were manufacturers of asbestos insulation products.

Asbestos products generally have wrought widespread and monstrous suffering. It is reported that insurers of asbestos manufacturers now face roughly 16,000 damage suits and that new cases are filed at the rate of 450 per month. During the past forty years, some nine million American workers still alive today were exposed to asbestos, and a study to be published by the Labor Department estimates that at least 8,500 workers -- perhaps as many as 10,000 -- will die each year until the end of this century from asbestos-related cancers. Wall St.J., June 14, 1982, at 1, col. 6 (Midwest Ed.).

The district court consolidated the ten cases for pretrial purposes. The defendants and third-party defendants moved for summary judgment in nine of the actions based on Wisconsin's three-year statute of limitations

for personal injury and wrongful death, Wis. Stat. §§ 893.14, 893.205(1), and 893.205(2) (1977). The district court denied the motions, but certified that its denial "involves a controlling issue of law as to which there is a substantial ground for difference of opinion, and an immediate appeal therefrom may materially advance the ultimate termination of the litigation." Order of April 6, 1981 at 9. We then permitted these interlocutory appeals pursuant to 28 U.S.C. § 1292(b).

I

There is no dispute that Wisconsin law governs these causes of action and that Sections 893.14, 893.205(1), and 893.205(2) of the 1977 Wisconsin Statutes comprise the applicable statutes of limitations.[1] Those

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[1] Effective July 1, 1980, Sections 893.14, 893.205(1), and 893.205(2) of the 1977 Wisconsin Statutes were repealed and replaced by new Sections 893.04 and 893.54. 1979 Wis. Laws, ch. 323, § 28. Except for an amendment concerning medical malpractice actions (new § 893.55), the new statutes are

sections provide:

> 893.14 Actions, time for commencing.
>
> The following actions must be commenced within the periods respectively hereinafter prescribed after the cause of action has accrued * * *.
>
> 893.205 Within 3 years.
>
> Within 3 years:
>
> (1) An action to recover damages for injuries to the person* * *.
>
> (2) An action brought to recover damages for death caused by the wrongful act, neglect or default of another* * *.

The dispute underlying the motions for summary judgment concerns when a cause of action for asbestos-caused injuries "has accrued" within the meaning of these statutes and thus when the three-year period has begun running.

Wisconsin law is well established up to a point. "A cause of action accrues when

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essentially the same as those quoted in the text. Personal injury and wrongful death actions must be commenced "within 3 years" (new § 893.54) "from the time that the cause of action accrues" (new § 893.04).

there exists a claim capable of present enforcement, a suable party against whom it may be enforced, and a party who has a present right to enforce it." Barry v. Minahan, 127 Wis. 570, 573, 107 N.W. 488 (1906). In order to have "a claim [in tort] capable of present enforcement," the Wisconsin Supreme Court has held the plaintiff must have suffered "an injury," or "damages." See, e.g., United States Fire Ins. Co. v. E. D. Wesley Co., 105 Wis.2d 305, 316, 313 N.W.2d 833 (1982); Holifield v. Setco Industries, Inc., 42 Wis.2d 750, 755, 168 N.W.2d 177 (1969). The problem in the instant cases is to fix a time during the course of the plaintiffs' progressive development of asbestos-caused disease when the plaintiffs were "injured" and the limitations period began running.

There are roughly three different times during the course of an asbestos disease when a plaintiff might be deemed to have received the injury that starts the limitations period:

when (or while) the plaintiff is exposed to asbestos, when the plaintiff's disease is first medically diagnosable, or when the plaintiff's disease has manifested itself by symptoms such as shortness of breath that should or in fact do alert the plaintiff to the presence of a disease. Although no Wisconsin case is directly in point, the cases tend to support the second of these times, so that a cause of action accrues when the disease becomes diagnosable. Because of the importance of the question, we would have preferred to certify it to the Wisconsin Supreme Court, but no such procedure exists.

II

The district court held that the relevant injury occurs simultaneously with exposure and, presumably because continued exposure entails continued injury, that the statute of limitations begins to run at the date of the plaintiff's last exposure to asbestos. Order of January 9, 1981 at 7. Third-party defendant

Owens-Illinois, which is the only party on appeal to support the district court's theory, gives two reasons for deeming injury to occur with exposure: (1)"the mere presence of asbestos fibers constitutes an insult to the body" and (2) damage to the lungs often begins "shortly after the initial inhalation of asbestos fibers." Brief at 7.

There is some support in the Wisconsin cases for holding that a cause of action accrues when the body is invaded by a foreign substance. E.g., Peterson v. Roloff, 57 Wis.2d 1, 203 N.W.2d 699 (1973) (remnant of gallbladder and gauze left in abdomen); McCluskey v. Thranow, 31 Wis.2d 245, 142 N.W.2d 787 (1966) (eight-inch metal hemostat left in abdomen). In those cases, the Wisconsin Supreme Court has held that the injury occurred at the time the foreign object was placed in the body, rather than when the plaintiff began suffering from the implantation, Peterson v. Roloff, 57 Wis.2d at 3-7, 203 N.W.2d 699, or eventually dis-

covered the presence of the foreign object. McCluskey v. Thranow, 31 Wis.2d at 248-249, 142 N.W.2d 787. The Wisconsin Supreme Court has been clear, nevertheless, that "the date of the negligent act [i.e., when the foreign object invades the body] is not necessarily the benchmark for the commencement of a period of limitations. Only in the event the injury occurs on the same date can it be said the cause of action then 'accrues.'" Olson v. St. Croix Valley Memorial Hospital, Inc., 55 Wis.2d 628, 632, 201 N.W.2d 63 (1972). The Court has been even more careful in defective products cases to distinguish the dates of negligence and injury. "Even if the negligence that caused the injury occurred substantially in the past, as in products liability cases, the period of limitations commences to run from the time of injury, and not from the time of the negligent act or omission * * *." United States Fire Ins. Co. v. E. D. Wesley Co., 105 Wis.2d 305, 311, 313 N.E.2d 833 (1982)

(quoting Rosenthal v. Kurtz, 62 Wis.2d 1, 6, 213 N.W.2d 741 (1974).

[1] Thus the "injury" that starts the clock running is not the defendants' allegedly wrongful act of exposing the plaintiffs to asbestos, but instead the onset of harm to each plaintiff sufficient that "he can come into court, plead and prove certain facts and secure the relief requested." Holifield v. Setco Industries, Inc., 42 Wis.2d 750, 754, 755-756, 758-759, 168 N.W.2d 177 (1969). In the medical malpractice cases so far to come before the Wisconsin Supreme Court, the malpractice and the harm have been coincidental. In each case, the injury has been sufficiently established at the time of the malpractice that a plaintiff could bring suit immediately without his damages being too speculative to permit recovery. For example, even if a hemostat were causing no present discomfort, the plaintiff could sue immediately for removal of it from his abdomen.

On the contrary, as we understand the

matter, not all persons who are exposed to asbestos contract asbestosis or the other asbestos-related diseases, and at the outset it often is impossible to diagnose which of the persons exposed to asbestos will eventually contract a disease. As the district court found, "the reaction of persons exposed to asbestos dust is highly individual and * * * not all persons exposed contract a disabling injury." 504 F.Supp. 1210, 1212; see also Eagle-Picher Industries, Inc. v. Liberty Mutual Ins. Co., 682 F.2d 12 (1st Cir. 1982). Thus even persons who will eventually become ill may be unable to come into court immediately after exposure to asbestos, because at that time their illness is only a possibility.

Among the cases cited by Owens-Illinois, Olson v. St. Croix Valley Memorial Hospital, Inc., 55 Wis.2d 628, 201 N.W.2d 63 (1972), comes closest to holding that a cause of action may accrue even though whether there will be harm remains speculative. In Olson,

the plaintiff was given a transfusion of the wrong type of blood in 1962, which allegedly affected her ability to bear children. In 1966, she gave birth to a child that lived for only seven hours, and in 1969, she delivered a stillborn child. The plaintiff did not bring her action based on the negligent transfusion until 1970. The Wisconsin Supreme Court held that the action was barred by the three-year statute of limitations, the majority finding that the injury occurred at the time of the transfusion and a two-Justice concurrence finding that the injury occurred when the first child died.

The transfusion of bad blood in Olson is similar to the inhalation of asbestos fibers in these cases because in each case the plaintiff's worst damages were realized subsequent to the foreign substance entering the body. But the transfusion in Olson did not initiate a progressive illness. If an injury occurred at all (the Wisconsin Supreme Court expressed some doubt since the plain-

tiff bore a third and healthy child in 1967, 55 Wis.2d at 634), it must have happened at the time the plaintiff received the faulty transfusion. The alleged injury occurred to the plaintiff's capacity to bear children, which, according to her complaint, was impaired at the time of the transfusion. Assuming that her inability to bear children was immediately diagnosable, the Olson plaintiff could have brought suit for her injury at any time within three years of the transfusion. In the instant case, the asbestos-caused injury ordinarily is not even diagnosable, let alone provable in court, until some undetermined time after the plaintiff's initial exposure to asbestos.

As noted above, a cause of action cannot accrue until "there exists a claim capable of present enforcement." Barry v. Minahan, 127 Wis. at 573, 107 N.W. 488. It would be most unfair to hold that the period of limitations had begun running before the plaintiff can possibly prove a cause of action, although

as the Olson case demonstrates, the plaintiff's awareness of the injury is another matter. Moreover, the Wisconsin Constitution may prevent our construing the statute of limitations to cut off the plaintiff's right to sue for damages prior to a time when the plaintiff could prove the existence of an injury. See Wis. Const. art. 1, § 9 ("Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character * * * "); Kallas Millwork Corp. v. Square D Co., 66 Wis.2d 382, 393, 225 N.W.2d 454 (1975); Rosenthal v. Kurtz, 62 Wis.2d 1, 8, 213 N.W.2d 741 (1974). Accordingly, in cases where no ascertainable damages occurred until sometime after the wrongful act of the defendant -- primarily defective product cases -- the Wisconsin Supreme Court has held that the period of limitations does not begin running until there are indeed damages. See, e.g., Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp., 96 Wis.2d 314, 291

N.W.2d 825 (1980) (cause of action for negligent installation of pipeline accrues when cathodic protection begins shorting); Abramowski v. Wm. Kilps Sons Realty, Inc., Inc., 80 Wis.2d 468, 259 N.W.2d 306 (1977) (action for negligent home construction accrues when basement walls and foundation crack and cave in); Hartford Fire Ins. Co. v. Osborn Plumbing & Heating, Inc., 66 Wis.2d 454, 225 N.W.2d 628 (1975) (action for negligent installation of heater accrues at time of fire); Holifield v. Setco Industries, Inc., 42 Wis.2d 750, 168 N.W.2d 177 (1969) (action for wrongful death accrues when defective grinding wheel explodes). Therefore we hold that the limitations period does not necessarily begin at the time of plaintiff's exposure to asbestos and that the apparent premise of the district court's decision -- that injury and exposure are

simultaneous -- is incorrect.[2]

III

The plaintiffs contend that merely suffering diagnosable damages is insufficient to commence the period of limitations. They

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[2] Absent Wisconsin judicial precedent, the district court's decision that a cause of action accrues upon the plaintiff's last exposure to asbestos could be justified because the time of last exposure can be determined more certainly than any of the other suggestions and because that determination would require no expert medical witnesses. Cf. Insurance Co. of North America v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1230-1231 (6th Cir. 1980) (dissent's suggestion that asbestosis be deemed to occur ten years from date of first exposure), certiorari denied, ___ U.S. ___, 102 S.Ct. 686, 70 L.Ed.2d 650. Such line-drawing, however, is best left to either the Wisconsin legislature or the Wisconsin Supreme Court. See Peterson v. Roloff, 57 Wis.2d 1, 7, 203 N.W.2d 699 (1973) ("Because of the numerous cases in which the present three-year requirement for commencing an action by a party who is the victim of medical malpractice is too short, we strongly recommend to the legislature that the basic three-year statute for negligence actions due to medical malpractice be amended"); Wis. Stat. § 893.55 (effective July 1, 1980) (ameliorating the statute of limitations in medical malpractice cases).

argue that the period of limitations should not begin running until they know that they have been injured or, alternatively, until the injury in some noticeable way impairs their health so that they should know that they have been injured. The plaintiffs apparently argued on behalf of an even stronger version of the "discovery rule" before the district court, viz., that the cause of action does not accrue until "a plaintiff knew or should have known that he had a compensable injury contracted as a result of exposure to asbestos dust." Order of January 9, 1981 at 2.

The defendants and third-party defendants except Owens-Illinois argue for what in most cases would be an earlier date, when the damages are "demonstrable" or "reasonably capable of medical diagnosis." Although we do not make specific findings on the matter, in most of the consolidated cases below plaintiffs apparently had a diagnosable (often diagnosed) injury to their lungs many

years before the illness significantly impaired their health and probably before the plaintiffs either knew the cause of their injury or that it would be compensable.

[2] The Wisconsin Supreme Court has not decided a personal injury case involving an asbestos-caused or progressively disabling disease, but its other decisions indicate clearly that the plaintiff's actual knowledge that an injury has occurred or knowledge of the cause of the injury is irrelevant to when a cause of action has accrued. See e.g., Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp., 96 Wis.2d 314, 324, 291 N.W.2d 825 (1980) ("The injury need not * * * be of such magnitude as to identify the causal factor"); Peterson v. Roloff, 57 Wis.2d 1, 203 N.W.2d 699 (1973); Olson v. St. Croix Valley Memorial Hospital, Inc., 55 Wis.2d 628, 201 N.W.2d 63 (1972). Similarly, whether a plaintiff knows that an injury is compensable under some legal theory has not been a factor in deciding when the cause of

action accrues. Cf. Boehm v. Wheeler, 65 Wis.2d 668, 679-680, 223 N.W.2d 536 (1974) (plaintiff's ignorance of legal malpractice does not toll statute of limitations). The Wisconsin Supreme Court has hinted that its prior cases preclude it from adopting a discovery rule "in [medical] malpractice cases only," Rosenthal v. Kurtz, 62 Wis.2d 1, 13, 213 N.W.2d 741 (1974); however, the Court's practice has been to defer any such extension of the limitations period to the Wisconsin legislature. E.g., Rod v. Farrell, 96 Wis.2d 349, 354-355, 291 N.W.2d 568 (1980); Peterson v. Roloff, 57 Wis.2d 1, 7, 203 N.W.2d 699 (1973). At about the same time that it adopted a discovery rule for medical malpractice cases, the Wisconsin legislature considered and rejected a discovery rule to apply in all types of personal injury actions. 1979 Assembly Bill 327 (introduced March 21,

1979; defeated Nov. 11, 1979)[3] We doubt that the Wisconsin Supreme Court would now contradict the legislature's apparent resolution of the question. See Boehm v. Wheeler, 65 Wis.2d 668, 680, 223 N.W.2d 536 (1974) (considering legislature's failure in 1973 to enact discovery rule statutes as a reason not to adopt a judge-made discovery rule).[4]

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[3] The defeated bill would have provided, in pertinent part: "an action to recover injuries to the person shall be commenced within 3 years after the person injured discovers the injury or reasonably should have discovered the injury whichever first occurs, or be barred."

[4] The plaintiffs cite cases from other jurisdictions, in particular Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155 (8th Cir. 1975) (construing Minnesota law), in order to suggest that a discovery rule is better law. However, the result we have reached is strongly entailed by the Wisconsin precedents and therefore we do not need to consider the balance struck by other states between the policies "of discouraging stale and fraudulent claims, and * * * of allowing meritorious claimants, who have been as diligent as possible, an opportunity to seek redress for injuries sustained." Peterson v. Roloff, 57 Wis.2d at 6, 203 N.W.2d 699. Nor is a discovery rule mandated apparently by various provisions of

[3] The harder question is what quantum of damages must be sustained for the cause of action to accrue. Specifically, we must decide whether the cause of action accrues only when the disease has progressed to the stage that it actually impairs the plaintiff's well-being or otherwise is noticeable to the plaintiff, or instead when the plaintiff could first prove that he has the disease through medical diagnosis. As noted above, the plaintiffs argue for a time when the plaintiff suffers some noticeable impairment, while the defendants (except Owens-Illinois) argue for when the disease is first diagnosable. In the medical malpractice cases decided prior to enactment of the new discovery rule statute, the Wisconsin Supreme Court stated that the limitations period begins when the injury

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the federal Constitution. See Steinhardt v. Johns-Manville Corp., 54 N.Y.2d 1008, 446 N.Y.S.2d 244, 430 N.E.2d 1297 (Ct. App. 1981), certiorari denied, ___ U.S. ___, 102 S.Ct. 2226, 73 L.Ed. 2d ___.

was diagnosable without regard for any noticeable impairment to the plaintiff. We believe that the Wisconsin Supreme Court would apply that standard here also.

For example, in Olson, supra, the plaintiff was deemed to have suffered an injury at the time she received the faulty transfusion since it was then that her ability to bear children allegedly was affected. Although the plaintiff was not noticeably impaired until she lost her first child (and she did not in fact notice the impairment until she lost a second child), the Court's opinion implied that if she could prove her cause of action at all, it was provable at the time of the transfusion. The losses of the plaintiff's children were "consequential injuries * * * [which] had no effect on a cause of action already accrued." 55 Wis.2d at 634, 201 N.W.2d 63. Similarly, in McCluskey, supra, the plaintiff suffered no impairment from the hemostat lodged in his abdomen and did not learn of its presence

until x-rayed in the course of an unrelated examination. Nevertheless, the Court held that the cause of action accrued at the time the hemostat was left in the plaintiff's abdomen. 31 Wis.2d at 250-251, 142 N.W.2d 787.

The plaintiffs' strongest argument that there is no injury until they are noticeably impaired comes from a recent property damage decision authored by Justice Coffey now Circuit Judge Coffey of this Court, Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp., 96 Wis.2d 314, 291 N.W.2d 825 (1980). That case involved a suit by the Wisconsin Natural Gas Company to recover damages caused by the negligent installation of a 14-mile natural gas pipeline. The Gas Company alleged that the contractor was negligent in failing to provide adequate support for the underground pipeline in light of anticipated shifting soil conditions, and that the engineering inspector failed properly to supervise the installation. The damage to the pipeline due

to the faulty installation occurred gradually and was evidenced by the increasing occurrence of "casing shorts" which knocked out portions of the pipeline's electrical anti-corrosion mechanism. The plaintiffs in the instant cases point out that the Wisconsin Supreme Court did not hold that the Gas Company's cause of action accrued at the time that the first casing short occurred, which would have barred the action under the applicable statute of limitations. Rather, the Court found "that the discovery of a single casing short, in a relatively new pipeline, is not 'sufficiently significant' to alert the Gas Company to the possibility of major defects throughout the entire 14 mile pipeline." 96 Wis.2d at 325, 291 N.W.2d 825 (quoting Tallmadge v. Skyline Construction, Inc., 86 Wis.2d 356, 359, 272 N.W.2d 404 (Ct. App. 1978). Based on that language, the plaintiffs here contend that their causes of action accrued only "when the evidence of injury * * *[became] sufficiently significant to alert the injured party to the possibility"

of an asbestos-created disease. 96 Wis.2d at 324, 291 N.W.2d 825 (quoting Tallmadge, 86 Wis.2d at 359, 272 N.W.2d 404).

[4] In any event, it is irrelevant whether the evidence of injury leads the plaintiff to realize that the disease was caused by exposure to asbestos. The portion of the Tallmadge opinion quoted by the Wisconsin Supreme Court continues: "The injury need not, however, be of such magnitude as to identify the causal factor." Id. But a test that looks for evidence of an injury "sufficiently significant to alert" plaintiffs might be appropriate in the instant cases provided the plaintiffs here were as diligent in searching for disease as the Gas Company had been in searching for damage to its pipeline. Justice Coffey began his opinion with a detailed statement of the Gas Company's efforts to protect its pipeline and detect malfunctions:

> Construction of the pipeline was commenced in January, 1968 and became

operational in September of the same year. Two months thereafter, in November, shortly after the pipeline was operational, the Gas Company conducted a survey to test for possible corrosion. Following this survey, in early 1969 (March or April), the utility retained the Harco Corporation (Harco), a corrosion engineering firm specializing in cathodic protection, to conduct a more extensive corrosion survey and to assist in developing a system of cathodic protection on the pipeline. In May of 1969 Harco located one casing short at a street crossing but concluded that the pipeline could be cathodically protected from corrosion "with little difficulty." Harco then designed and installed a system of cathodic protection to prevent further corrosion to the pipeline. In January, 1970, after the cathodic protection process was in operation, Harco recommended a yearly survey of the system. The Gas Company, following Harco's recommendation, conducted a second survey in early 1971, and after finding a number of casing shorts, determined that the pipeline could no longer be considered under cathodic protection. As a result of their findings in the 1971 survey, the Gas Company hired a second engineering and consulting firm, the Hinchman Company (Hinchman), to conduct a comprehensive survey of the entire 14 mile pipeline installed less than three (3) years earlier. Hinchman discovered six (6) "shorts * * and recommended that the utility clear and repair the underground casing shorts thus necessitating extensive excavation.

> Hinchman recommended that the utility excavate and repair as opposed to increasing the electrical current of the cathodic protection process because the current was already operating at its maximum level.
>
> As a result of Hinchman's report and recommendation, the Gas Company embarked upon an extensive program of repair and maintenance of the pipeline to clear the "shorts."

96 Wis.2d at 318-319, 291 N.W.2d 825 (footnotes omitted). Since all the evidence of damage was uncovered by or quickly turned over to the expert pipeline-injury detectors hired by the Gas Company, Justice Coffey's standard of what is sufficient to alert the Gas Company to the existence of an injury is essentially the same as what reasonably was diagnosable as an injury.

Justice Coffey went on to find that casing shorts were "'quite a usual phenomena' in the industry" and are often caused by factors other than the improper installation of the pipeline. 96 Wis.2d at 325, 291 N.W.2d 825. Moreover, to distinguish between a random short and one that portended a serious

defect, the Gas Company would be required to dig up the whole length of the pipeline. But Justice Coffey held "[i]t is unreasonable for the defendants to expect or this court to require the plaintiff, the Gas Company, to excavate the entire 14 miles of pipeline less than one year old in May of 1969 at a cost in excess of $400,000 based on their discovery of one single casing short." Id. Therefore, "the Gas Company did not actually suffer an injury until a number of 'casing shorts' rendered the cathodic protection process ineffective and necessitated an extensive excavation and repair program to clear the pipeline of the shorts." Id.

Analogously, if the plaintiffs here had hired experts in the field of lung care and the experts found symptoms that with the benefits of hindsight might have indicated the presence of a disease but were dismissed at the time as insignificant, the plaintiffs would have a strong argument that no provable cause of action had yet accrued. Moreover,

the Wisconsin Natural Gas case indicates that a cause of action will not have accrued if a plaintiff failed to undergo expensive or risky medical processes that might have detected the disease but were unreasonable under the circumstances. The appropriate standard for when a cause of action accrues, however, depends on what reasonably should "alert" the plaintiff only if he has been assiduously attentive to his health. We thus regard Wisconsin Natural Gas to be an exceptional application of the more general rule that the cause of action accrues when the asbestos-caused disease becomes diagnosable -- e.g., provable by medical evidence in court -- a standard that ordinarily is independent of what occurrences might attract the plaintiff's attention.

IV

The rule that we believe would be adopted by the Wisconsin courts is quite harsh. As noted above, it appears that most of the

plaintiffs had a diagnosable disease more than three years before they brought suit against the various defendants. We can only hope that the Wisconsin or federal legislatures will enact some measure to compensate these plaintiffs and others like them who are victims of a product that the consuming public for many years wanted manufactured. The consuming public paid a portion of the cost of manufacturing asbestos insulation in the form of its purchase price. The rest of the cost has been paid by the plaintiffs with their health.

We remand to the district court for further proceedings consistent with this opinion.

APPENDIX B

OPINION OF THE DISTRICT COURT

Charlotte E. NEUBAUER, personally and as personal representative of the Estate of Clifford S. Neubauer et al., Joy Skofronick, personally and as personal representative of the Estate of Clifford E. Mason, Walter J. Presechnik, Clarence O. Reimer and Mary M. Reimer, Darwin Frank Witkowski, Sr., and Eleanore Witkowski, Clarence P. Lillge and Hertha E. Lillge, Erich E. Eckoldt and Mamie Eckoldt, Robert J. Gaynor and Lavellette Gaynor,

Plaintiffs,

v.

OWENS-CORNING FIBERGLAS CORPORATION, a foreign corporation, et al.,

Defendants.

William GLOBIG and Kathrine A. Globig, Robert A. Wetzel and Grace M. Wetzel,

Plaintiffs,

v.

JOHNS-MANVILLE SALES COMPANY, et al.,

Defendants.

Civ. A. Nos. 77-C-52, 77-C-446, 77-C-491, 77-C-492, 78-C-43, 78-C-44, 78-C-131, 78-C-544, 79-C-117 and 79-C-980.

United States District Court, E. D. Wisconsin.

Decided January 9, 1981.

DECISION AND ORDER

REYNOLDS, Chief Judge.

These actions are product liability suits brought for the recovery of damages for injuries allegedly sustained by the plaintiffs or their decedents as a result of the inhalation of asbestos dust. In the eight cases in which the male plaintiffs contracted asbestosis (C.A. Nos. 77-C-491, 77-C-492, 78-C-43, 78-C-44, 78-C-131, 78-C-544, 79-C-117, and 79-C-980), motions to dismiss and for summary judgment have been brought on behalf of all defendants and third-party defendants. In the two cases in which the decedents of the plaintiffs contracted mesothelioma (C.A. Nos. 77-C-52 and 77-C-446) motions to dismiss and for summary judgment have been brought only as to the claims for damages for medical costs and for pain and suffering but not as to the wrongful death claims.

The issue posed by the pending motions is the proper interpretation of the applicable

state statute of limitations, formerly § 893.205(1), Wis. Stats., which provided that within three years of its accrual, "[a]n action to recover damages for injuries to the person"* must be brought. Former § 893.14, Wis. Stats. (revised and renumbered as § 893.04, Wis. Stats., by the laws of 1979, effective July 1, 1980), which was in effect at the time these actions were commenced, provided:

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* By the laws of 1979, c. 323, § 28, eff. July 1, 1980, former § 893.205(1), as revised, was renumbered § 893.54, Wis. Stats. (1979). By the same act a separate statute of limitations for medical malpractice actions, § 893.55, Wis. Stats. (1979), was created. Present § 893.54 provides, as did former § 893.205(1), for a three-year statute of limitations for an action to recover damages for injuries to the person. Present § 893.55 provides that a medical malpractice action must be brought within three years of the date of injury, or one year from the date the injury was or should have been discovered but in no event more than five years from the date of injury, or where a foreign object is left in the body within one year from the date the injury was or should have been discovered.

> "The following actions must be commenced within the periods respectively herinafter prescribed after the cause of action has accrued * * *."

The plaintiffs argue for an interpretation of § 893.205(1) which permits suit to be filed within three years after a plaintiff knew or should have known that he had a compensable injury contracted as a result of exposure to asbestos dust. The defendants and third-party defendants argue variously for a date of injury without regard to whether a plaintiff at the time of injury knew or had reason to know its cause or for a date of last exposure to asbestos-containing products manufactured by a particular defendant or third-party defendant.

The male plaintiffs and the decedents of the female plaintiffs in the Neubauer and Skofronick cases worked for many years with insulation products. The defendants and third-party defendants are all manufacturers of insulation products and at various times made their products with asbestos content. It is

alleged that the plaintiffs and two decedents were exposed during their working years to asbestos-containing insulation products manufactured by some or all of the defendants and third-party defendants and as a result suffered compensable injuries.

The parties agree that asbestosis and mesothelioma are progressive diseases caused by the prolonged exposure to asbestos dust. There appears to be no dispute that the plaintiffs and two decedents contracted one or the other of the two diseases as a result of exposure to asbestos dust. There also appears to be no dispute that a tendency toward pneumonia, shortness of breath, wheezing, pleural calcification, and pulmonary dysfunction may be symptomatic of asbestos-caused disease. Uncontradicted affidavits on file prepared by Dr. John Schluetter, an expert retained by the defendant Johns-Manville Sales Company, establish that asbestos-caused diseases tend to develop over time and, once contracted, may become progressively worse even after

exposure to asbestos dust ceases because of the internal reaction to asbestos fibers lodged in the lungs. An uncontradicted affidavit on file prepared by Dr. Nathan Grossman, an expert retained by the plaintiffs, establishes that the reaction of persons exposed to asbestos dust is highly individual and that not all persons exposed contract a disabling injury. The parties do not agree on what symptoms each plaintiff exhibited at what time nor on the extent of disability suffered by each plaintiff nor on the time when each plaintiff may be said to have suffered a compensable injury. Conflicting affidavits have also been filed regarding each plaintiff's knowledge of his medical condition three years and one day before filing suit.

Because there are no Wisconsin court cases applying § 893.205(1), Wis. Stats., to a plaintiff with a progressive industrial disease, the plaintiffs have pointed out to the court cases of a similar nature which

have arisen in other jurisdictions. Thus, in Karjala v. Johns-Manville Products Corporation, 523 F.2d 155 (8th Cir. 1975), an asbestosis case, the Court held that the applicable statute of limitations did not begin to run until damage sufficient to maintain a cause of action had occurred, the plaintiff's harm had become manifest, and he had reason to know the cause of his harm. See also Borel v. Fibreboard Paper Products Corporation, 493 F.2d 1076, 1102 (5th Cir. 1973), and Insurance Company of North America v. Forty-Eight Insulations, Inc., 451 F.Supp. 1230 (E.D. Mich. 1978), both applying a discovery rule. The third-party defendant Owens-Illinois, Inc., on the other hand, points to several cases which hold that the statute of limitations commences to run on the date of plaintiff's last exposure to the disease-causing substance, that being the date on which the defendant's wrongful conduct ceases. See, e.g., Rowe v. Gatke Corporation, 126 F.2d 61 (7th Cir. 1942) (applying Indiana law

in an asbestosis case and therefore holding that the statute of limitations runs two years "after the last day of the last exposure to the hazards of the disease"); Armour & Company, Inc. v. Mitchell, 262 F.2d 580 (6th Cir. 1958); Simmons v. Mutual Liability Insurance Co., 433 F.Supp. 747 (S.D. Ala. 1976). However, "'Decisions of the courts of other states involving their statutes [of limitations] and prior decisions are of little value in cases arising in Wisconsin under Wisconsin law.'" Koschnik v. Smejkal, 96 Wis.2d 145, 153 n. 6, 291 N.W.2d 574 (1980), citing Reistad v. Manz, 11 Wis.2d 155, 158, 105 N.W.2d 324 (1960). Therefore, it is to the Wisconsin cases interpreting § 893.205(1), Wis. Stats., and the state statutes of limitations in general that this Court must look for guidance in these cases.

For the most part cases which have arisen under § 893.205(1), Wis. Stats., have been medical malpractice cases, and the Wisconsin Supreme Court has uniformly held that in those

cases the statute of limitations begins to run on the date of injury which normally corresponds to the date of the negligent act without regard to the date on which the plaintiff discovered his injury and its cause. See, e.g., Rod v. Farrell, 96 Wis.2d 349, 291 N.W.2d 568 (1980) (holding that in the case of a man who had a congenital hernia repaired in 1955 and did not discover until 1975 when he had exploratory surgery to discover the cause of his wife's failure to become pregnant that during the hernia surgery a portion of his vasa had been removed and he was sterile, the three-year statute of limitations began to run from the date of the hernia surgery); Olson v. St. Croix Valley Memorial Hospital, Inc., 55 Wis.2d 628, 201 N.W.2d 63 (1972) (holding that plaintiff's cause of action accrued in 1962 when she was given a transfusion of the wrong type of blood which allegedly resulted in the birth of a stillborn child in 1969); McCluskey v. Thranow, 31 Wis.2d 245, 142 N.W.2d 787 (1966) (holding

that plaintiff's cause of action accrued in 1956 when a hemostat was left in her abdomen during surgery and not in 1962 when the presence of the hemostat was discovered during routine x-rays). In a product liability action under § 893.205(1), the cause of action is also held to accrue at the time of injury as opposed to the time of the negligent act (the sale of the defective product) or the time of discovery. Holifield v. Setco Industries, Inc., 42 Wis.2d 750, 168 N.W.2d 177 (1969); Denzer v. Rouse, 48 Wis.2d 528, 532, 180 N.W.2d 521 (1970). In most product liability cases the fact of damage will be readily apparent at the time of injury. Holifield v. Setco Industries, Inc., supra. In the medical malpractice area, in contrast, damage is not always apparent at the time of injury. The Court has recognized the inequity of its holding that the statute of limitations may begin to run before the plaintiff has an opportunity to learn of his injury, and seemingly before any compensable damage has

occurred, Olson v. St. Croix Valley Memorial Hospital, Inc., supra, at 635, 201 N.W.2d 63 (concurrence of Justice Hallows), but has held consistently that correction of the inequity must await legislative action. Peterson v. Roloff, 57 Wis.2d 1, 6-7, 203 N.W.2d 699 (1973); Koschnik v. Smejkal, 96 Wis.2d 145, 153-154, 291 N.W.2d 574 (1980).

Outside of the medical malpractice context, the Court also looks to the date of injury and not to the date of the negligent act or the date of discovery. Peterson v. Roloff, supra, at 6, 203 N.W.2d 699. Indeed, the Court has noted that in certain instances, e.g., § 893.19(7) (fraud) and § 102.12 (worker's compensation), the legislature has provided expressly for tolling of a statute of limitations until discovery, and the Court applies the rule of "expressio unius est exclusio alterius" to conclude that, therefore, in other instances the running of the statute of limitations does not await discovery. Peppas v. Marshall & Ilsley Bank, 2 Wis.2d 144, 148-149,

86 N.W.2d 27 (1957). Thus, in Milwaukee County v. Schmidt, Garden & Erikson, 43 Wis.2d 445, 168 N.W.2d 559 (1969), an architectural malpractice and breach of contract action brought pursuant to § 893.19(5), Wis. Stats., it was held that the statute of limitations began to run at the time of the breach even though the plaintiff did not then know or have reason to know of the breach. In Peppas v. Marshall & Ilsley Bank, supra, the Court held that the statute of limitations governing recovery of money paid out under a forged endorsement began to run from the time the sum was deducted from plaintiff's account and not from the time he learned of the forgery. In Denzer v. Rouse, 48 Wis.2d 528, 533, 180 N.W.2d 521 (1970), a legal malpractice action, the statute of limitations began to run on plaintiff's claim against his attorney at the time he bought a parcel of property containing a misdescription in the deed and not at the time he attempted to sell the parcel:

> "* * * Since '...a person has a "cause of action" when he can come into court, plead and prove certain facts and secure the relief requested,' his cause of action was then complete, except that he did not know that it then existed. The only missing ingredient was actual knowledge that a mistake in describing the property had been made. The date of gaining such knowledge is the date of discovery. As this court has said, '... That the injury did not become noticeable or was not in fact noticed until a later date is another question....' Tolling of the statute of limitations in this state does not await the time or fact of discovery. When negligence and resultant injury have occurred, the statute starts to run. * * *"

Similarly, in Milwaukee County v. Schmidt Garden & Erikson, supra, at 455, 168 N.W.2d 559, quoting from Ott v. Hood, 152 Wis. 97, 100, 139 N.W. 762 (1913), the Court stated:

> "'"A cause of action on contract, whether for damages or otherwise, commences to run from the time of the breach, whether the facts are known to the party having the right or not, and if the latter, whether through ignorance, neglect, or mistake of such party or fraud of his adversary. There is no exception (citing cases).
>
> "'"The inexorable nature of our statutes of limitations is most emphatically illustrated by Pietsch

> v. Milbrath, 123 Wis. 647, 101 N.W. 388, 102 N.W. 342, and, in effect, by all the other cited cases, by use therein of this language from Bank of Hartford County v. Waterman, 26 Conn. 324, 330: 'Ignorance of his rights on the part of a person against whom the statute has begun to run will not suspend its operation. He may discover his injury too late to take advantage of the appropriate remedy. Such is one of the occasional hardships necessarily incident to a law arbitrarily making legal remedies contingent on mere lapse of time.'"' (Emphasis added.)"

[1, 2] Applying the general rules set forth above on interpretation of Wisconsin statutes of limitations, it is my opinion that the Wisconsin Supreme Court would hold that the date of injury for a plaintiff who contracts a progressive disease as a result of protracted exposure to a disease-causing substance is the date of his last exposure to the disease-causing substance. Since asbestosis and mesothelioma are caused by a tissue reaction to imbedded asbestos fibers, the final date of inhalation would be the final date of injury without regard to the date on which the symptoms of the disease became

manifest or the date on which the plaintiff had reason to know of his injury or its cause. As stated above, "'"* * *'Ignorance of his rights on the part of a person against whom the statute has begun to run will not suspend its operation [even though] [h]e may discover his injury too late to take advantage of the appropriate remedy. * * *'"' * * *." Milwaukee County v. Schmidt, Garden and Erikson, supra, at 455, 168 N.W.2d 559.

It is also my opinion, however, that because of the nature of the process of contracting asbestosis or mesothelioma, the date of injury is the date of last exposure to the disease-causing substance, i. e., asbestos, without regard to its particular manufacture. The third-party defendant Owens-Illinois, Inc., has moved for summary judgment on the ground that it ceased the manufacture of asbestos-containing insulation products in 1958 and that none of the plaintiffs or their decedents were exposed to products containing asbestos manufactured by it within three years

of filing suit. That argument goes to causation and not to the date of injury, and it is a question of fact to be resolved at trial whether the plaintiffs' exposure to products manufactured by Owens-Illinois, Inc., contributed to their injuries. In other words, because the types of injuries suffered by the plaintiffs in these cases result from prolonged exposure, because earlier exposure may contribute to a subsequent injury, and because, but for the earlier exposure, later exposure to asbestos-containing products might not have resulted in injury to a particular plaintiff, the Court will look to the date of a plaintiff's last exposure to any product containing asbestos to determine the date on which the statute of limitations began to run for his claims against all manufacturers of asbestos-containing products to which he was exposed during his working life. This result is mandated by the nature of the physical process of contracting asbestos-caused diseases. A plaintiff in Wisconsin

must sustain actual damage, and not merely potential damage which never ripened into actual damage, before he may recover. Widemshek v. Fale, 17 Wis.2d 337, 340-341, 117 N.W.2d 275 (1962); Central Mutual Insurance Company v. H. O., Inc., 63 Wis.2d 54, 59, 216 N.W.2d 239 (1974). It is also consistent with the Wisconsin Supreme Court's holding that a manufacturer who sells a defective product may be liable for an indefinite period of time after the sale and, specifically, until the resultant injury has occurred and the plaintiff's cause of action has accrued. Holifield v. Setco Industries, Inc., 42 Wis.2d 750, 757-758, 168 N.W.2d 177 (1969).

[3] This holding is not consistent with the Court's tentative decision announced during the oral argument held on December 12, 1980, which was that in regard to the statute of limitations, a discovery rule would be applied to these cases. Upon reconsideration of the arguments of the parties, the briefs and affidavits submitted, and the case law,

the Court has concluded that Wisconsin law does not recognize the discovery rule in applying its statutes of limitations except where provided for expressly by the legislature. Therefore, this Court, having jurisdiction solely because of diversity, is bound to apply and to follow the law of the State of Wisconsin.

The hearing previously scheduled for January 15 and 16, 1981, to discuss the applicability of the statute of limitations on a case-by-case basis is cancelled. A motion and briefing schedule is established, however, for any summary judgment motions which the parties may wish to bring based upon lack of contact by any plaintiff or her decedent with any product containing asbestos more than three years and one day before filing suit. A schedule is also established in the event any party intends to request certification of this ruling to the United States Court of Appeals for the Seventh Circuit.

For the foregoing reasons,

IT IS ORDERED that the motions for summary judgment of the defendant Johns-Manville Sales Company, of liaison counsel on behalf of all third-party defendants, of the Keene Corporation, of Armstrong Cork Co., of Owens-Corning Fiberglas Corp., and of Owens-Illinois, Inc., for summary judgment are denied.

IT IS FURTHER ORDERED that if any party intends to seek certification of this decision and order to the United States Court of Appeals for the Seventh Circuit, the motion for certification shall be served and filed within fourteen days from the filing date of this order; answering briefs shall be served and filed within twenty-one days of the filing date of this order; and any reply briefs shall be served and filed within twenty-five days of the filing date of this order.

IT IS FURTHER ORDERED that if any party intends to move for summary judgment on the ground of lack of contact with products containing asbestos by any plaintiff within three years and one day of filing suit, such motion

shall be served and filed with supporting material on or before February 16, 1981; answering briefs shall be served and filed on or before March 3, 1981; and any reply briefs shall be served and filed on or before March 9, 1981.

APPENDIX C

ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 16, 1982

Before

Hon. Walter J. Cummings, Chief Judge
Hon. Potter Stewart, Justice (Retired)*
Hon. Jesse E. Eschbach, Circuit Judge

CHARLOTTE E. NEUBAUER, et al.,
Plaintiffs-Appellees,
Cross-Appellants,
Nos. 81-1939-81-1951
81-8021--81-8033 vs.
OWENS-CORNING FIBERGLAS CORP., et al.,
Defendants-Appellants,
Cross-Appellees,
vs.
PITTSBURGH CORNING CORP., et al.,
Third Party Defendants-
Appellants, Cross-Appellees.

Appeals from the United States
District Court for the Eastern
District of Wisconsin.

Nos. 77 C 52, 77 C 446, 77 C 491,
77 C 422, 78 C 43, 78 C 44,
78 C 131, 78 C 544, 79 C 117
and 79 C 980.

John W. Reynolds, Chief Judge.

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* The Honorable Potter Stewart, Associate Justice (Retired) of the Supreme Court of the United States, is sitting by designation.

O R D E R

On consideration of the petition for rehearing filed in the above-entitled cause by plaintiffs-appellees-cross-appellants Charlotte E. Neubauer, et al., all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

ORDER GRANTING PERMISSION TO APPEAL

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 3, 1981

Before

Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. William J. Bauer, Circuit Judge

MISCELLANEOUS NOS: 81-8021, 81-8024, 81-8025, 81-8026, 81-8027, 81-8028, 81-8029, 81-8030, 81-8031 and 81-8032.

OWENS-CORNING FIBERGLAS, et al.,
Petitioner,

vs.

CHARLOTTE E. NEUBAUER, et al.,
JOY SKOFRONICK, etc.,
WALTER J. PRESECHNIK,
CLARENCE O. REIMER and MARY M. REIMER,
DARWIN FRANK WITKOWSKI, SR. and
ELEANORE WITKOWSKI,
CLARENCE P. LILLGE and HERTHA E. LILLGE,
ERICH E. ECKOLDT and MAMIE ECKOLDT,
ROBERT J. GAYNOR and LAVELLETTE GAYNOR
WILLIAM GLOBIG and KATHRINE A. GLOBIG,
ROBERT A. WETZEL and GRACE M. WETZEL,
Respondents.

NO. 81-8022
JIM WALTER CORPORATION, et al.,
Petitioners,

vs.

CHARLOTTE E. NEUBAUER, et al.,
Respondents.

NO. 81-8023
JOHNS-MANSVILLE SALES COMPANY,
Petitioner,

vs.

CHARLOTTE E. NEUBAUER, et al.,
Respondents.

NO. 81-8033
CHARLOTTE E. NEUBAUER, et al.,
Petitioners,

vs.

OWENS-CORNING FIBERGLAS, et al.,
Respondents.

Appeals from the United States District Court for the Eastern District of Wisconsin.

Nos. 77-C-52, 77-C-446, 77-C-491, 77-C-492, 78-C-43, 78-C-44, 78-C-131, 78-C-544, 79-C-117, 79-C-980.

Judge John W. Reynolds

This matter comes before the court for its consideration upon the following documents:

1. The "PETITION FOR PERMISSION TO APPEAL UNDER 28 U.S.C. Sec. 1292 (b)", filed herein on April 15, 1981, by counsel for the petitioner, Owens-Illinois, Inc.

2. The "THIRD PARTY DEFENDANTS' CONSOLIDATED PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. Sec. 1292(b) AND RULE 5, FEDERAL RULES OF APPELLATE PROCEDURE" filed herein on April 16, 1981, by counsel for third party defendants.

3. The "PETITION FOR PERMISSION TO APPEAL" filed herein on April 16, 1981, by counsel for petitioner Johns-Manville Sales Corporation.

4. The "PETITION OF OWENS-CORNING FIBERGLAS FOR PERMISSION TO APPEAL A DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN" filed herein on April 16, 1981, by counsel for the petitioner, Owens-Corning Fiberglas Corporation. Docket No. 81-8024 (77-C-446)

5. Same petition as 4. -- Docket No. 81-8025 (77-C-491)

6. Same petition as 4. -- Docket No. 81-8026 (77-C-492)

7. Same petition as 4. -- Docket No. 81-8027 (78-C-43)

8. Same petition as 4. -- Docket No. 81-8028 (78-C-44)

9. Same petition as 4. -- Docket No. 81-8029 (78-C-131)

10. Same petition as 4. -- Docket No. 81-8030 (78-C-544)

11. Same petition as 4. -- Docket No. 81-8031 (79-C-117)

12. Same petition as 4. -- Docket No. 81-8032 (79-C-980)

13. The "PETITION FOR PERMISSION TO APPEAL" filed herein on April 17, 1981, by counsel for the Plaintiffs.

On consideration thereof,

IT I ORDERED that the petitions for permission to appeal under 28 U.S.C. Sec. 1292(b) are hereby GRANTED.

IT IS FURTHER ORDERED that the Clerk of the United States District Court certify and transmit the records in these appeals to this court on or before June 15, 1981. Counsel for the petitioners are directed to pay $65.00 docketing fee for these appeals to the Clerk of the District Court on or before June 12, 1981.

IT IS ALSO FURTHER ORDERED that these appeals be consolidated for purposes of briefing and oral argument and that a docketing conference, pursuant to Federal Rule of Appellate Procedure 33 be scheduled. The parties will be notified by separate notice of the docketing conference.